STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID WILLIAM WARFIELD,

Defendant-Appellant.

UNPUBLISHED
December 11, 2003

No. 242172
Oakland Circuit Court
LC No. 2001-178156-FH

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant was charged with operating a motor vehicle under the influence of intoxicating liquor (OUIL), MCL 257.625(1), third offense, MCL 257.625(8)(c), and operating a motor vehicle with a suspended license, MCL 257.904(1). Defendant pleaded no contest to the operating a motor vehicle with a suspended license charge, and a jury found him guilty of the lesser offense of operating a motor vehicle while impaired (OWI), MCL 257.625(3), third offense, MCL 257.625(10)(c). Defendant appeals as of right his jury trial conviction. We affirm, but remand for correction of the amended judgment of sentence.

Defendant argues that the trial court erred in denying his motion to suppress and in admitting the results of defendant's Data Master tests. We disagree.

Findings of fact regarding a motion to suppress evidence are reviewed for clear error, and the trial court's ultimate decision on a motion to suppress is reviewed de novo. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001); *People v Fosnaugh*, 248 Mich App 444, 450; 639 NW2d 587 (2001). The trooper who administered the Data Master tests testified at the evidentiary hearing. The Data Master generally asks for two tests. The purpose of the second test was to verify the first. After the trooper collected two samples from defendant, the machine prompted the trooper to ask for a third test. This had only happened one other time when the trooper was operating the machine. The trooper asked defendant to give a third breath sample, and defendant declined. Although the trooper did not yet know the results of the first two tests, he knew that there was a variance between them. Defendant asked if he had to give the third sample. The trooper told defendant that he already had two good tests. The machine did not print the results until after the third sample was refused. Defendant's first result was 0.13 percent, and his second was 0.11 percent. The trooper did not request a blood test or seek a warrant.

The trial court denied defendant's motion to suppress the two results obtained from the Data Master by the trooper. The trial court found that the trooper "testified that he requested a third test and that it was denied. Therefore, the evidence shows that the Officer did comply with the requirement of 1994 AACS, R 325.2655(1)(e)-(f)."

Defendant argues that the results should have been suppressed because the trooper's comment that he had "two good tests" nullified his request for a third sample. Defendant contends that this constitutes a violation of Rule 325.2655(1)(f), which provides:

> A second breath alcohol analysis shall be requested from the person being tested and administered, unless the person refuses to give the second sample or a substance is found in the person's mouth subsequent to the first test that could interfere with the test result. Obtaining the first sample is sufficient to meet the requirements for evidentiary purposes prescribed in section 625c of Act No. 300 of the Public Acts of 1949, as amended, being §257.625c of the Michigan Compiled Laws. The purpose of obtaining a second sample result is to confirm the result of the first sample. A second sample result shall not vary from the first sample result by more than [+-0.01% when the blood alcohol concentration range is 0.00% - 0.14%.] If the variation is more than that allowed, a third breath sample shall be requested from the person being tested and a third result may be obtained. If the third result does not conform to the allowable variation of either of the first two tests, as established in table 1, the person shall be requested to submit a blood or urine sample for analysis by an approved laboratory. [1999 AC, R 325.2655(1)(f) (table omitted).]

"The rules of statutory construction apply to the interpretation of administrative rules. Thus, meaning should be given to every word of a rule, and no word should be treated as surplusage or rendered nugatory if at all possible. In addition, if the language of the rule is clear and unambiguous, additional judicial construction is neither necessary nor permitted, and the language must be applied as written." *Fosnaugh, supra* at 451 (citations omitted).

"The admission of chemical test results in a prosecution for OUIL/UBAL is authorized by MCL 257.625a(6). To be admissible, the test results must be both relevant and reliable. Further, suppression of test results is required only when there is a deviation from the administrative rules that call into question the accuracy of the test." *Fosnaugh, supra* at 450 (citations omitted).

In *Fosnaugh*, this Court considered the language of administrative rule 1994 AC, R 325.2655(1)(f).[1] *Fosnaugh, supra*. The defendant in *Fosnaugh* submitted to the officer's requests for two breath tests. *Id*. at 447. When the defendant blew the second breath sample into the machine, an "invalid sample" message appeared on the machine's screen. *Id*. The second test was aborted because the machine detected the presence of mouth alcohol, which would interfere with the results. *Id*. at 452. No additional test was requested or administered by the

[1] 1999 AC, R 325.2655(1)(f) is identical to 1994 AC, R 325.2655(1)(f).

officer. *Id*. at 447. The *Fosnaugh* Court considered the portion of 1994 AC, R 325.2655(1)(f) that provides "[a] second breath alcohol analysis shall be requested from the person being tested and administered, unless the person refuses to give the second sample or a substance is found in the person's mouth subsequent to the first test that could interfere with the test result." *Id*. at 451-452. This Court found that a third test was not required under the circumstances and that, because the police had complied with Rule 325.2655(1)(f), suppression of the results was not warranted. *Id*. at 452-453.

Defendant argues that *People v Collopy*, a companion case to *People v Willis*, 180 Mich App 31; 446 NW2d 562 (1989), applies. The variance between the defendant's first and second samples was beyond that permitted by the rule, and a third test was not administered. *Collopy*, *supra* at 34. Subsequently, in *People v Tomko*, 202 Mich App 673, 676; 509 NW2d 868 (1993), this Court considered *Willis* and concluded that, because "*Willis* [and *Collopy*] concerned violations of the version of the administrative rule that preceded the 1988 amendment . . . *Willis* does not control cases falling under the provisions of the administrative rule as it was amended in 1988." In *Tomko*, this Court considered 1988 AC, R 325.2655(1)(f). *Id*. at 675. The defendant in *Tomko* had submitted to a PBT and one Breathalyzer test at the police station. *Id*. at 674. When asked to submit to a second Breathalyzer test, the defendant said that he would not take it if he did not have to take it. *Id*. at 675. 1988 AC, R 325.2655(1)(f) provided, in part:

> [a] second breath alcohol analysis may be administered, except when the person refuses to give the second sample. Obtaining the first sample is sufficient to meet the requirements for evidentiary purposes prescribed in the implied consent statute, being §257.625c of Act No. 300 of the Public Acts of 1949 [subsequently amended and renumbered], as amended. The purpose of obtaining a second sample is to confirm the result of the first sample. [*Tomko, supra* at 675-676.]

When the rule was changed in 1988, the word "shall" was replaced with the word "may," which this Court found supported "the conclusion that the use of the word 'may' denotes discretionary activity." *Id*. at 676. This Court further held that "the admissibility of Breathalyzer test results . . . does not hinge on the administration of a second test as long as the subject was offered a second test." *Id*. This Court further found that "[i]f a subject prefers not to take a second test, it need not be administered, and we see nothing in the language of either the statute or the administrative rule that creates a duty on the part of the police to urge the subject to take a second test." *Id*. at 677.

Although the *Tomko* Court applied a prior version of 1999 AC, R 325.2655(1)(f), the analysis of the rule is the same. The 1999 version of the rule states that, if the variation between the two samples "is more than that allowed, a third breath sample shall be requested" and a third result "*may* be obtained." 1999 AC, R 325.2655(1)(f) (emphasis added). The trooper requested a third sample, thereby fulfilling the requirement of the rule. Because the word "may" denotes discretionary activity, there is nothing in the language of either MCL 257.625c or 1999 AC, R 325.2655(1)(f) that creates a duty on the part of the police to urge the subject to take a third test. *Tomko*, *supra* at 676-677. Moreover, defendant declined to take the third test before Trooper Stewart commented that he had "two good tests." In our opinion, these comments did not "nullify" the earlier request for a third test. Therefore, because the trooper did not violate 1999 AC, R 325.2655(1)(f), suppression of the Data Master results was not warranted.

Defendant also argues that the trial court abused its discretion requiring reversal in admitting the PBT result as rebuttal evidence. We disagree.

The decision whether to admit evidence will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). "However, the decision frequently involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence. We review questions of law de novo. Therefore, when such preliminary questions are at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law." *Id*. (citation omitted). However, to establish a reversible evidentiary error, defendant must demonstrate that the court's ruling was, more probable than not, outcome determinative. *People v Callon*, 256 Mich App 312, 328; 662 NW2d 501 (2003); see, also, *People v Cornell*, 466 Mich 335, 363-364; 646 NW2d 127 (2002).

During the trooper's cross-examination, defense counsel attacked the reliability of the Data Master results. Defense counsel stated that, when the machine is out of variance, it "means that there is a reliability problem." Counsel asked the trooper, "[y]ou've already said that you were taught that there was a variance and an accuracy problem, right?" "You are taught that when you see a variance, the machine has a problem." "Well what we are about to hear is this is an accuracy problem, an oddity, and something wasn't right. And there's no correction whatsoever done as a result of his not taking the third test, right?" Defense counsel hypothesized that, if the trooper had obtained a third test result of 0.15 percent, the trooper would have been required to take the machine out of service. Counsel further suggested that if the trooper had obtained a third sample, and the result did not conform to the variance, he would have been required to request a blood or urine sample, and that to get a blood or urine sample, the trooper would have needed a warrant. Counsel further pointed out that no blood test was ever requested.

After that trooper testified, the prosecutor moved to recall the trooper who had administered the PBT. The prosecutor stated that, pursuant to MCL 257.625a(2)(b)(iii), the trooper should be permitted to testify regarding the results of the PBT that was administered during the traffic stop. The prosecutor argued that, because defense counsel raised the issue of the reliability of the Data Master, the results of the PBT should be admitted. Defense counsel argued that the statute did not apply because he had not raised a rising blood alcohol content defense. The prosecutor argued that it was not fair for defense counsel to attack the credibility of the Data Master when the prosecutor was not allowed to introduce evidence supporting the machine's reliability. The prosecutor argued that defense counsel's whole line of questioning was about how the machine was inaccurate and defendant was not drunk at the time he was pulled over. The trial court found that it was proper for the prosecution to recall the trooper and to admit the PBT result. The result, which was 0.13 percent, was admitted.

MCL 257.625a(2)(b) provides that:

> [t]he results of a preliminary chemical breath analysis are admissible in a criminal prosecution for a crime enumerated in section 625c(1) or in an administrative hearing for 1 or more of the following purposes:
>
> (i) To assist the court or hearing officer in determining a challenge to the validity of an arrest. This subparagraph does not limit the introduction of other competent evidence offered to establish the validity of an arrest.

> (ii) As evidence of the defendant's breath alcohol content, if offered by the defendant to rebut testimony elicited on cross-examination of a defense witness that the defendant's breath alcohol content was higher at the time of the charged offense than when a chemical test was administered under subsection (6).
>
> (iii) As evidence of the defendant's breath alcohol content, if offered by the prosecution to rebut testimony elicited on cross-examination of a prosecution witness that the defendant's breath alcohol content was lower at the time of the charged offense than when a chemical test was administered under subsection (6). [MCL 257.625a(2)(b).]

Defendant argues that the PBT result is not admissible under MCL 257.625a(2)(b) because defense counsel never raised a rising blood alcohol content defense.

The prosecutor argues that otherwise inadmissible evidence may be admissible as rebuttal evidence under *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). The prosecutor's reliance on *Figgures* is misplaced. *Figgures* does not stand for the proposition that inadmissible evidence becomes admissible merely because it is used for rebuttal. As this Court said in *Katt*, "we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law." *Katt, supra* at 278. If this Court finds that admission of the PBT result is inadmissible under MCL 257.625a(2)(b), the PBT result does not automatically become admissible because the prosecutor used it as rebuttal evidence.

Defendant's PBT result was 0.13 percent. His first Data Master result was 0.13 percent, and his second Data Master result was 0.11 percent. Looking at the two Data Master results alone would not suggest that the blood alcohol level was rising because the second result was actually lower than the first. We conclude, however, that defendant was not prejudiced by admission of the PBT result and reversal is not required. Defendant was charged with operating a motor vehicle while intoxicated. The trial court instructed the jury that if they found that defendant's blood alcohol content was between 0.07 percent and 0.10 percent, the law permitted them to infer that defendant's ability to operate a motor vehicle was impaired. The jury convicted defendant of the lesser-included offense of operating a motor vehicle while impaired. Thus, admission of defendant's PBT result of 0.13 percent did not prejudice defendant. The PBT result was offered to support the reliability of the Data Master results, and the jury's decision to convict defendant of the lesser-included offense indicates that they did not rely on the Data Master results. Therefore, admission of the PBT had no effect on the jury's verdict and, thus, if erroneous, constituted harmless error. See *Cornell, supra*.

Defendant also argues that the trial court abused its discretion in admitting the PBT result where the result was obtained by a class II operator. We disagree.

"Preliminary breath alcohol test instruments shall be operated only by operators trained by class IIIA or class IV operators to operate such equipment." 1999 AC, R 325.2655(2)(a). The trooper was a class II PBT operator. "'Class II operator' means a person who is certified by the department to administer an evidential breath alcohol analysis on an evidential breath alcohol test instrument specified by the department." 1999 AC, R 325.2651(1)(c). It appears as if defendant has misread or misunderstood Rule 325.2655(2)(a), which provides that a class II PBT operator must be *trained by* a class IIIA or IV operator. Because there is nothing in the rule that

suggests that a PBT operator must be a class IIIA or IV operator, defendant's argument is without merit. Accordingly, the trial court did not abuse its discretion in admitting the PBT result.

Defendant argues that the trial court abused its discretion in granting the prosecutor's challenge to a prospective juror for cause. We disagree. This Court reviews a trial court's rulings on challenges for cause based on bias for abuse of discretion. See *People v Williams*, 241 Mich App 519, 521; 616 NW2d 710 (2000).

MCR 2.511(D) provides, in pertinent part:

> The parties may challenge jurors for cause, and the court shall rule on each challenge. A juror challenged for cause may be directed to answer questions pertinent to the inquiry. It is grounds for a challenge for cause that the person:
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> (1) is not qualified to be a juror;
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> (2) has been convicted of a felony;
>
> (3) is biased for or against a party or attorney;
>
> (4) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be;
>
> (5) has opinions or conscientious scruples that would improperly influence the person's verdict[.]

"MCR 2.511(D)(3), (4), and (5) provide in pertinent part that a venireman may be excused for cause based on a demonstrated bias for or against a party, if the venireman shows a state of mind that will prevent the juror from rendering a just verdict, or if the venireman has opinions that would improperly influence the juror's verdict." *Williams*, *supra*.

The prospective juror, who had a drug case pending in another court, stated that the police had falsely accused him, and he believed that one officer was lying. When questioned by defense counsel, the following colloquy occurred:

> *DEFENSE COUNSEL:* So, do you think you could be fair based on that?
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> [*THE JUROR*]*:* Possibly.
>
> *DEFENSE COUNSEL:* Possibly?
>
> [*THE JUROR]:* Possibly not.
>
> *DEFENSE COUNSEL:* Well, why do you think you can't be fair. Let's just get right to the chase.
>
> [*THE JUROR*]*:* I don't think either way. I answered the question, I don't know.

> *DEFENSE COUNSEL:* [Is] it a problem that you might -- this officer might take the stand and you might be judging him a little differently because you know that you've personally experienced a lying officer?
>
> [*THE JUROR*]*:* Perhaps.
>
> *DEFENSE COUNSEL:* Okay. That's fair enough.

The prosecutor challenged the juror for cause, and the trial court excused him. Defendant argues that the trial court should not have excused the juror for cause because he stated that he could rule objectively in defendant's case.

Because the juror believed that a police officer was lying in the case pending against him, he could "possibly" or "possibly not" be fair in defendant's case. He also acknowledged that his experience with the lying officer in his case would "perhaps" cause him to judge the officers in defendant's case differently. "This Court defers to the trial court's superior ability to assess from a venireman's demeanor whether the person would be impartial." *Williams*, *supra* at 522. It was not an abuse of discretion for the trial court to conclude that the juror had a bias toward one party, showed a state of mind that would prevent him from rendering a just verdict, or had opinions that would improperly influence his verdict. See *id*. at 521.

Finally, we note that the judgment of sentence and the amended judgment of sentence incorrectly indicates that defendant was convicted of OUIL. Because defendant was convicted of OWI, we remand for the ministerial purpose of correcting the judgment of sentence to reflect defendant's actual conviction of OWI, third offense. See MCR 6.435(A); MCR 7.216(A)(7).

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Mark J. Cavanagh
/s/ Helene N. White